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Supreme Court of the United States

OCTOBER TERM, 1943

No. 434

MORRIS U. SCHAPPES,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK AND BRIEF IN SUPPORT THEREOF

JOSEPH R. BRODSKY,
Attorney for Petitioner.

JOSEPH R. BRODSKY,
DAVID M. FREEDMAN,
of Counsel.

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Supreme Court of the United States

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No.

MORRIS U. SCHAPPES,
Petitioner,
against

PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK

To the Supreme Court of the United States:

Your petitioner, Morris U. Schappes, respectfully alleges:

A

Summary Statement of the Matter Involved

In March, 1940, the New York State Legislature created a Joint Legislative Committee to investigate specified matters relating to the public educational system of the State (R. 163; Peo. Exs. 1, 2, R. 1666).* Included in the resolution was a provision to investigate "the extent to which, if any, subversive activities may have been permitted to be carried on in the schools and colleges of such educational system." The Committee became generally known as the Rapp-Coudert Committee.

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* All references to the record refer to page numbers.

Under color of the resolution the Committee sought to ascertain the identity of members of the faculty and staff of the College of the City of New York, a public educational institution, who were members of the Communist Party. Petitioner was called as a witness before the Committee. He had been a member of its teaching staff for thirteen years (R. 1246). He testified at length at a private hearing and subsequently repeated his testimony at a public hearing (R. 1256, 1257). He testified, among other things, that he had been a member of the Communist Party for several years prior to 1939, when he resigned because of pressure of professional activities (R. 193, 212-213).

Petitioner testified at the public hearing on March 6, 1941 (R. 172). On March 18, 1941, he was indicted in the Court of General Sessions of the County of New York for the crime of perjury, a felony, because of alleged false testimony given at that hearing (R. 3-14). The indictment was drawn in four counts, each one relating to the answer given by petitioner to a specific question put to him at that hearing. The statements petitioner made, which are alleged to have been false, are as follows:

Count 1. That up to about February, 1938, there were only four members in the Communist Party unit at City College and that from then until about December, 1939, he was the only member of the unit; whereas there were approximately fifty members of said unit (R. 3-5).

Count 2. That he and two named members of that unit were the editors of a publication known as "Teacher Worker", published under the auspices of the unit; whereas approximately ten persons had been engaged in publishing and editing the periodical and petitioner and the other two named persons had never been its editors (R. 5-7).

Count 3. That he knew no Communist Party member who was a member of the Teachers Union or College Teachers Union, while he was a member of the party, other than himself; whereas approximately fifty other Communist Party members were members of the said unions while he was such a party member (R. 7-8).

Count 4. That there was no Communist Party fraction in the Teachers or College Teachers Union; whereas there was a Communist Party fraction in each union, consisting of those members of said unions who were members of the Communist Party (R. 9-10).

To prove that the answers made by the petitioner were false the prosecution offered the testimony of three witnesses, William M. Canning, Annette Sherman and Oscar Zeichner, who claimed to have been members of the City College unit of the Communist Party at some time during which petitioner had been a member (R. 288, 715, 793). Petitioner denied that they had been members of the Communist Party unit of which he was a member. All three witnesses had likewise testified at private and then at public hearings of the Rapp-Coudert Committee. *At the trial, disclosure was made by each of the three witnesses that when first examined at the private hearing each of them had denied membership in the Communist Party* (R. 369, 735, 802). Nevertheless each one had been examined at some length at such private hearing after such denial.

Since all the material testimony of the three witnesses was predicated upon their testimony that they had been members of the Communist Party, the revelation that they had previously sworn to the opposite effect raised sharply the question of their credibility—particularly as that supported petitioner's claim that they had not been members

of the party.[1] Petitioner therefore sought to exercise his undoubted right to cross-examine the witnesses as to their contradictory statements by subpoenaing the Legislative Committee to produce the minutes of the private hearings at which such contradictory testimony had been given (Deft.'s Ex. F, R. 1669; see appendix annexed hereto; R. 435 et seq.). The prosecuting attorney recognized petitioner's right to confront the witnesses with their prior inconsistent statements and offered no objection to the minutes of the private hearing being made available to the Court or petitioner (R. 435, 442).

The Legislative Committee, however, declined to honor the subpoena and refused to produce the minutes. An attorney for the Committee appeared before the Court and explained its position as follows:

> "Your Honor, the position of the Legislative Committee is that it will respectfully decline to produce, in response to the subpoena, the minutes of the private hearings of Mr. Canning and the other people referred to in the subpoena.
>
> "I would like to make it clear, however, that the Committee's position is not predicated on the private testimony of the three witnesses mentioned; but the Committee's position is that these private records, namely, the private hearing record and other confidential data received by the Committee, cannot be compelled to be produced by the subpoena process; that the Legislative Committee is a branch and an arm of the State Legislature; that it is independent and a co-equal body in the governmental system of this state just as much as the judicial and executive departments" (R. 437).

The Court thereupon assured the Committee's counsel that the minutes would be examined by the Court and only

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[1] The trial district attorney anticipated that their claim of membership would be challenged by petitioner. In his opening to the jury, he said: "We are going to offer a witness by the name of Canning, who, the defendant will say, is lying. He says he was a Communist, a member of the Unit at City College. * * * The defendant maintains that this man Canning is not telling the truth" (R. 152).

that portion made available to the petitioner that the Court found was material to the issues at the trial and that any secret matter contained in the minutes would be protected by the Court, and urged that the Committee reconsider the matter (R. 442). Nevertheless the Committee adhered to its original position and the minutes were not produced (R. 558). Instead the Committee counsel offered for the record a resolution of the Committee adopted some months before the trial which purported to make the minutes secret and confidential.

> "Resolved, that no testimony given by any witness at a private hearing shall be divulged to any person other than a member of the committee or an employee thereof without the consent of the witness by the Committee or any member thereof or any of the Committee's agents, employees or counsel or the reporter or stenographer making the record thereof, except that any such testimony may be used at a public hearing to impeach or refresh the recollection of the witness, and with the further exception that if such witness, after giving such testimony, shall be shown to be unavailable, at a public hearing, or, being called at a public hearing, shall contradict or deny or fail to recall such testimony given at such private hearing or the facts testified to thereat, then such testimony given at such private hearing may be read in evidence at such public hearing, but this provision shall not be deemed to impair the right of this Committee to divulge such private testimony in any proceeding to punish such witness for contempt or to enforce the giving of testimony, or in support of a complaint of perjury therein to any officer or agency charged with prosecution therefor, or in any prosecution for such perjury before any court of record or committing magistrate" (R. 558-559).

Thereafter the Court ruled that the Committee's contention was justified and denied petitioner's request that the Court order the production of the minutes (R. 626).

From the point of view of petitioner, the crucial issue in the case was the credibility of the People's witnesses.

They had testified at some length at the private hearings after denying membership in the Communist Party. Since all their testimony at the trial rested on their claim of membership, it is logical to assume that there was considerable variance between what they testified to at the private hearings and what they swore to at the trial. It was the most significant evidence available to petitioner as to the credibility of these witnesses.

There was no claim made at any time that that evidence was insignificant or immaterial or inconsequential. On the contrary, the refusal of the Committee to produce the minutes would argue the contrary. For the Committee was the instigator, the real prosecutor in the case. It desired the conviction; it supplied the evidence necessary to prosecute. The evidence in its possession that might lead to exoneration it withheld—first, on the pretext that as a part of the Legislature it could not be brought into court, and then on the strength of a resolution of its own adoption allegedly making minutes of a private hearing available to prosecute but unavailable for defense. Whatever the pretense, the purpose and effect was plain—it was to deny petitioner the opportunity of cross-examining the witnesses by means of evidence that could have discredited them.

By yielding to such action of the Legislative Committee, the ruling of the Court denied petitioner the right to cross-examine the witnesses on contradictory statements made by them on the very matters they had testified to at the trial, and the jury was deprived of essential evidence on the issue of the credibility of the prosecution's witnesses. This denial of the right to cross-examine the witnesses was a denial of the "due process" required by the Fourteenth Amendment to the United States Constitution. Petitioner therefore duly excepted to the ruling of the Court (R. 626).

Petitioner was found guilty on all of the four counts (R. 13). He was sentenced to a term of not less than one year and six months and not more than two years on the first count, and sentence was suspended on the other three counts (R. 14).

On successive appeals to the Appellate Division, First Department (1942, 264 App. Div. 917), and the Court of Appeals (1943, 291 N. Y. 575) the conviction was affirmed, Lehman, Ch. J., dissenting in a memorandum. The decision in the latter Court was a final judgment by the highest Court in the State. The case is now pending in the Court of General Sessions of the County of New York, where it was remitted by the Court of Appeals for further action.

Under the practice in New York State, no errors are assigned after trial or on appeal. The federal constitutional question was specifically raised in the memorandum of law submitted to the trial court (R. 626) [see *Bryant* v. *Zimmerman* (1928), 278 U. S. 63] and by exception taken to the Court's ruling (R. 626) and in the briefs on appeal. The remittitur of the Court of Appeals to the Court of General Sessions of the County of New York, where the case is now pending, certified that a federal constitutional question under the "due process" clause of the Fourteenth Amendment had been presented to and was necessarily considered by it (R. 1687).

The petitioner is at large on bail, pending the determination of this application for a writ of certiorari, by order of Hon. John T. Loughran, Associate Judge of the Court of Appeals.

B

Jurisdiction

1. This Court's jurisdiction rests on Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 344).

2. The judgment sought to be reviewed by this petition is a final judgment rendered by the Court of Appeals, the highest Court in the State of New York. The date of the remittitur was July 20, 1943, and this application is made within three months thereafter.

C

Question Presented

The Trial Court had before it the following situation:

A Legislative Committee instigates a criminal prosecution against the petitioner for perjury alleged to have been committed while testifying at a hearing of such Committee. The only witnesses against petitioner have previously testified before such Committee. Aside from these witnesses, no other proof is offered by the People of petitioner's guilt. By their own admission, in the course of such prior testimony, they had testified to the contrary of what they testify to at the trial on the most material matters involved in the case. If their previous testimony was true, all that they are testifying to at the trial is false, not just error. Such prior testimony is in the possession of the Legislative Committee. Put before the jury, it would have supplied the most damaging evidence available to petitioner on the issue of the credibility of the People's witnesses. Without such testimony, petitioner in effect is denied the opportunity to cross-examine them. But the Committee refuses to produce the minutes. With full realization of the effect of such refusal on petitioner's right to cross-examination and the jury's right to all the evidence available on the question of the witnesses' credibility, the Court sustains the action of the Legislative Committee.

In the light of the foregoing, the question presented is this:

> Where, in a prosecution for perjury alleged to have been committed at a hearing of a Legislative Committee, the sole evidence of falsity was the testimony of three witnesses, all of whom admitted to having testified at previous private hearings of the same Legislative Committee in a directly contradictory manner on the very matters testified to at the trial, and the Legislative Committee refuses on subpoena to sub-

mit the minutes of the testimony of such witnesses at the private hearings for the inspection of the Court, whereby petitioner was denied the opportunity of cross-examining the witnesses on such prior contradictory testimony, was the action of the Court upholding the position taken by the Committee and its failure to safeguard petitioner's right to cross-examination, a denial to petitioner of "due process" as guaranteed by the Fourteenth Amendment to the United States Constitution?

D

Reasons Relied on for Allowance of Writ

1. Petitioner was convicted on the testimony of witnesses whose credibility he assailed. Cross-examination of them on prior contradictory testimony on material matters was made impossible by the refusal of the State to produce the minutes of such prior testimony. This was a deprivation of the right of cross-examination and hence of the right of confrontation. That right would seem to be protected by the "due process" clause of the Fourteenth Amendment. However, this Court does not appear to have directly passed upon that question. The constitutional question is thus a substantial one. The problem, from a constitutional point of view, is novel.

2. The decisions of this Court in *Alford* v. *United States* (1931), 282 U. S. 687, and *District of Columbia* v. *Clawans* (1937), 300 U. S. 617, holding the denial of cross-examination to be a fatal error and denial of a fundamental right, and the implication contained in *Snyder* v. *Massachusetts* (1934), 291 U. S. 97, make it reasonably certain this Court would hold the right to cross-examination to be embraced in the meaning of "due process" as used in the Fourteenth Amendment. The action of the state courts was contrary to the settled rule in the New York courts and to the opinions of this Court as evidenced by the cited cases.

3. The Legislative Committee claimed it was not subject to process of court. The courts of the several states appear to be divided on the question of whether process may issue to co-ordinate branches of government. Reasons of state aside, principle would dictate that no agency of government may interfere with or prevent the courts from administering justice, nor should the rights of individuals to the protection of the law be nullified by arbitrary action of government. An authoritative decision of this Court on the power and duty of the courts to safeguard the rights of persons against violence by a Legislative Committee under the conditions of this case, is essential.

E

Prayer for Writ

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Court of General Sessions of the County of New York, State of New York, commanding said court to certify and send to this Court a complete transcript of the record and all proceedings had in the Court of Appeals of the State of New York in the cause therein entitled "People of the State of New York against Morris U. Schappes"; and that said case may be reviewed and determined by this Court and the decision therein finally revised; and that your petitioner may have such other and further relief in the premises as to this honorable Court may seem appropriate.

Dated: October 15, 1943.

Respectfully submitted,

MORRIS U. SCHAPPES,
By JOSEPH R. BRODSKY,
Attorney.